

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS RAY SPENCER,

Defendant-Appellant.

UNPUBLISHED

January 30, 2007

No. 263961

Saginaw Circuit Court

LC No. 04-024091-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of 40 months to 15 years in prison for one count of third-degree criminal sexual conduct, MCL 750.520d(1)(c). We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Defendant argues that the trial court improperly scored offense variable (OV) 3 at 10 points instead of zero points, and that the trial court improperly scored OV 11 at 50 points instead of zero points. Although OV 3 should have been scored at 5 points instead of 10 points, we find that this error is harmless because it has no effect on the proper minimum sentencing range.

This Court reviews a sentencing court's scoring of a defendant's guidelines to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Although defendant has framed his issue as one of departure from the sentencing guidelines, this issue is more accurately stated as one of improper scoring. A sentencing court has discretion with respect to the scoring of offense variables, provided that evidence of record supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Defendant first contends that OV 3 was erroneously scored at 10 points, and argues that there was no evidence to indicate the victim required any medical treatment. Offense variable 3 addresses "physical injury to a victim." MCL 777.33. The court is to score OV 3 at 10 points if "[b]odily injury requiring medical treatment occurred to a victim," and at 5 points if "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(d) and (e). The

term “requiring medical treatment” refers to “the necessity for treatment and not the victim’s success in obtaining treatment.” MCL 777.33(3).

The evidence does not adequately support a score of 10 points for OV 3 in this case. Although the testimony suggested some injury to the victim, there was no evidence of any treatment provided to the victim and no evidence that any treatment was necessary. Although success in receiving treatment is not necessary to score OV 3 at 10 points, evidentiary support for a score of 10 points is completely lacking. Accordingly, we conclude that the trial court abused its discretion in scoring OV 3, which should have been scored at 5 points for injuries not requiring medical treatment.

Defendant also contends that OV 11 was erroneously scored at 50 points.¹ Because a second count of criminal sexual conduct was dismissed, and because no points should have been scored for the penetration that formed the basis of the conviction, defendant argues that OV 11 should have been scored at zero points. We disagree.

Offense variable 11 addresses criminal sexual penetration. MCL 777.41. Under OV 11, the trial court should score 50 points if two or more criminal sexual penetrations occurred, 25 if one criminal sexual penetration occurred, and zero if no criminal sexual penetration occurred. Additionally, MCL 777.41(2)(c) instructs that no points should be scored for the penetration that forms the basis of a first-degree or third-degree criminal sexual conduct conviction.

Contrary to defendant’s assertions, the United States Supreme Court decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), does not apply to Michigan’s indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006). In Michigan, a fact can be established for the purpose of guidelines calculations by a mere preponderance of the evidence, and need not be established at trial beyond a reasonable doubt. *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446, vacated in part on other grounds 469 Mich 415 (2003). The fact that a defendant was not convicted by proof beyond a reasonable doubt does not mean that he cannot be found by a preponderance of the evidence to have committed the same conduct. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991).

We find that there was sufficient evidence to support the trial court’s score of OV 11 at 25 points. The victim’s mother testified that the victim told her that defendant put his “ding-a-ling in her in the front and back.” The victim’s mother found stool around the victim’s anal area, which she indicated was unusual. Additionally, the victim testified that defendant put his “ding-a-ling” in her. Specifically, the victim indicated that defendant put his “ding-a-ling” in her front part where “you go to the bathroom,” and in her back part “where you go poop.” Thus, we conclude that a score of 25 was proper because it does not include points for the vaginal

¹ Defendant contends that the trial court scored OV 11 at 50 points. Although the sentencing information report indicates a score of 50 points for OV 11, the sentencing transcript reveals that the trial court actually scored OV 11 at 25 points.

penetration forming the basis of defendant's conviction, but does account for an anal penetration, which was supported by a preponderance of the evidence.

Where a court has abused its discretion in scoring one or more offense variables, but reduction of the score would not alter the total offense variable score so as to change the level at which defendant was ultimately placed in calculating the guidelines range, the error is harmless and remand for resentencing is not required. *People v Johnson*, 202 Mich App 281, 290, 292; 508 NW2d 509 (1993). In the present case, defendant's total offense variable score, including the error, was 55 points. Defendant's total offense variable score as reduced by correction of the five-point scoring error would be 50 points. Third-degree criminal sexual conduct is a Class B offense, MCL 777.16y, and defendant's Prior Record Variable level is A. Pursuant to MCL 777.63, total offense variable scores between 50 and 74 points constitute the same level for calculating the guidelines range. Therefore, reduction of defendant's score from 55 to 50 would not alter defendant's total offense variable score. The error was harmless, defendant's sentence is within the appropriate range, and remand is not required.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper